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No. 03-1055

In The Supreme Court of the United States

STEVEN H. STERN, etc.,

Cross-Petitioner,

v.

DAVID A. GILL, CHAPTER 7 TRUSTEE,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF

RICHARD D. BURSTEIN
Counsel of Record
RICHARD K. DIAMOND
HOWARD KOLLITZ
DANNING, GILL, DIAMOND & KOLLITZ, LLP
2029 Century Park East,
Third Floor
Los Angeles, California 90067
310-277-0077

Counsel for Cross-Respondent, David A. Gill, as Chapter 7 Trustee

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INTRODUCTION

David A. Gill, Chapter 7 Trustee ("Trustee"), Petitioner and Cross-Respondent herein, pursuant to Rule 15, subsection 8 of the Rules of this Court, respectfully submits this Supplemental Brief to comment on the effect of this Court's Opinion in *Yates v. Hendon*, 541 U.S. ___ (2004). Cross-Petitioner Steven H. Stern ("Stern") conditionally seeks a Writ of Certiorari ("Conditional Petition") to review the Ninth Circuit's unanimous conclusion in its Amended Opinion that on Stern's bankruptcy petition date his plan was not ERISA qualified because on that date it lacked a covered employee. Stern's Conditional Petition is in part based upon his assertion that this Court's then not yet issued Opinion in *Yates v. Hendon* would deal with issues that in turn would affect that aspect of the Ninth Circuit's Amended Opinion. See the Conditional Petition at pages 9-10. The Trustee urges this Court to conclude that nothing in its Opinion in *Yates v. Hendon* requires the granting of the Conditional Petition.

ARGUMENT

In the Trustee's Brief in Opposition to the Conditional Petition, the Trustee argued that ". . . nothing in *Yates v. Hendon* will raise questions that this case could resolve." Brief in Opposition at page 4. The Trustee argued that the question presented to the Court in *Yates* arose from the premise that ". . . a plan whose sole beneficiaries are the company's owners cannot qualify as an employee benefit plan under ERISA." The question before the Court in *Yates* was the petitioners' contention that Dr. Yates ". . . should not be excluded from being a participant in the Profit Sharing

Plan because other non-owner employees participated in the Profit Sharing Plan." Brief in Opposition at page 4.

The Court in *Yates v. Hendon* now holds:

> "If the plan covers one or more employees other than the business owner and his or her spouse, the working owner may participate on equal terms with other plan participants." *Yates, supra,* Slip Opinion at page 1.

The Court's holding thus confirms the *Yates* petitioners' position.

The facts before the Court in *Yates* were that "[f]rom the Profit Sharing Plan's inception, at least one person other than Yates or his wife was a participant." *Yates, supra,* Slip Opinion at page 3.

In analyzing the Department of Labor's applicable regulation at 29 C.F.R. 2510.3-3 (also cited in the within Conditional Petition and the Trustee's Brief in Opposition), the Court states that the regulation makes clear that "[p]lans that cover only sole owners or partners and their spouses . . . fall outside [ERISA]." *Yates, supra,* Slip Opinion at page 17. The Court further observed in footnote 6 of its Opinion, at page 17 of the Slip Opinion, that "[c]ourts agree that if a benefit plan covers only working owners, it is not covered by Title I. . . . *In re Watson,* 161 F.3d 593, 597 (CA 9 1998)."

The Trustee's analysis in his Brief in Opposition as to what was presented for decision by this Court in *Yates v. Hendon* is thus borne out by this Court's now-issued Opinion in *Yates. Yates* assumes that a plan configured as Stern's was configured on his bankruptcy petition date does not qualify under ERISA. *Yates* holds that an owner

can be a participant in an ERISA qualified plan if there are other non-owner participants. *Yates* says nothing that adversely affects the Ninth Circuit's conclusion that Stern's plan lost its ERISA qualification as of his bankruptcy petition date.

Yates v. Hendon thus does not dispose of anything that affects that aspect of the Ninth Circuit's Amended Opinion dealing with Stern's plan's lack of ERISA qualification on the bankruptcy petition date which is the basis of the Conditional Petition. What *Yates* does leave open, on remand, is the very question that is the subject of the Trustee's Petition, the reach of a trustee's avoidance powers, *Yates*, *supra*, Slip Opinion at page 20. *Yates* does not require that this Court grant the Conditional Petition. It does show that the Trustee's Petition should be granted.

CONCLUSION

For all the reasons set forth herein and in the Trustee's Brief in Opposition, it is respectfully submitted that even if the Court grants the Trustee's Petition, it should not grant the Conditional Petition. The Trustee urges the Court to grant his Petition.

Respectfully submitted,

RICHARD D. BURSTEIN
Counsel of Record
RICHARD K. DIAMOND
HOWARD KOLLITZ
DANNING, GILL, DIAMOND & KOLLITZ, LLP
2029 Century Park East,
Third Floor
Los Angeles, California 90067
310-277-0077

Counsel for Cross-Respondent, David A. Gill, as Chapter 7 Trustee